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境外投资者以分配利润直接投资暂不征收预提税

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以往，外商投资企业以留存收益增加注册资本，被视同为利润分配，需要缴纳预提所得税。这同样适用于以留存收益为在华的姐妹公司进行注资。随着政府新发布的通知，这一规定将随之改变：

继国务院发布《关于促进外资增长若干措施的通知》（国发[2017]39号文）后，财政部、税务总局等四部门于2017年12月21日联合发布了财税[2017]88号文（“88号通知”），就“境外投资者以分配利润直接投资暂不征收预提所得税政策”作了具体说明。

自2017年1月1日起，对境外投资者从中国境内居民企业分配的利润，直接投资于鼓励类投资项目，凡符合规定条件的，实行递延纳税政策，暂不征收预提所得税。此次的递延纳税政策无疑将极大减轻外资企业在华进行再投资时的税负，从而使得企业更愿意长期将利润留在中国。

前提条件

根据88号通知规定，享受递延纳税政策须同时满足以下四项条件：

- 必须以直接投资形式，包括境外投资者以分得利润进

Withholding Tax Deferral on Profits Used by Overseas Investors for Direct Investment

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In the past, if retained earnings of a foreign invested company were used to increase the registered capital, this transaction was deemed as a profit distribution triggering withholding tax on dividends. The same applied when the retained earnings served for the establishment of a sister company in China. This is going to be changed according to a newly issued government circular:

Following the Circular of the Chinese State Council on Several Measures to Boost the Growth of Foreign Investment (Guo Fa [2017] No. 39), four authorities including the Ministry of Finance and the State Administration of Taxation (“SAT”) jointly published the Circular “Cai Shui [2017] No. 88” (“Circular 88”) on December 21, 2017 to specify the deferral of withholding tax liabilities on profits used by overseas investors for further direct investment in China.

Effective from January 1, 2017, foreign investor’s profits from resident enterprises in China that are directly reinvested in encouraged investment projects will be entitled to the tax deferral and accordingly be temporarily exempted from withholding tax obligations, if relevant preconditions are fulfilled. The tax deferral policy will significantly ease the tax burden of foreign enterprises for their reinvestment in China without doubt and correspondingly motivate foreign enterprises to leave profits in China in a longer term.

Preconditions

According to the Circular 88, to enjoy the tax deferral policy, the following four preconditions must be met:

- The investment must be made in the form of direct investment, including equity investment like capital in-

行的增资、新建、股权收购等权益性投资行为，但不包括新增、转增、收购上市公司股份以及从关联方收购股权；

- 境外投资者宣告用于再投资的利润必须是已经实现的留存收益；
- 用于投资的资金（资产）必须直接划转到被投资企业或股权转让方账户，不得在境内外其他账户进行周转；
- 必须投资在属于《外商投资产业指导目录》中所列的鼓励外商投资产业目录，或《中西部地区外商投资优势产业目录》范围内的项目。

扣缴义务和后续管理

预提所得税的纳税人是境外投资者，扣缴义务人为利润分配企业，因此，境外投资者申报享受暂不征收预提所得税优惠，需要依靠扣缴义务人进行操作，具体规定如下：

- 境外投资者负有申报责任，应向利润分配企业提供其符合条件的资料；
- 利润分配企业经适当审核后，认为符合条件的，可暂不扣缴预提所得税，并向其主管税务机关履行备案手续；
- 税务部门在后续管理中经核实境外投资者不符合条件的，将征收税款延迟缴纳滞纳金。

此外，由于该税收优惠仅为纳税递延而非减免，因此符合条件的相关利润分配的纳税义务发生时间将递延至境外投资方实际收回上述再投资的时间节点。即在境外投资方通过股权转让、回购、清算等方式收回暂不征收预提所得税政策待遇的直接投资的实际收款日后 7 日内，应申报补缴递延的税款。如相关交易安排符合特殊性税务处理的条件，则仍可继续享受递延纳税政策。

追溯执行

递延纳税优惠政策追溯至 2017 年 1 月 1 日起执行，即境外投资者在 2017 年 1 月 1 日以后，以分得的股息、红利等权益性投资收益直接投资可以适用 88 号通知规定。对于在追溯生效期限内已扣缴了预提所得税的境外投资者，可在实际缴纳相关税款之日起三年内申请追补享受暂不征

crease, new enterprise incorporation and share acquisition by overseas investor, **but excluding the capital increase, conversion into share capital, share acquisition of listed companies and share acquisition in related parties;**

- Profits should be realized retained earnings that have been declared to be used for reinvestment;
- Funds (assets) for re-investment must be directly transferred to the account of invested party or share transferor, and may not be circulated in other domestic or overseas accounts;
- The re-investment must be made in the industries that fall into the encouraged investment projects listed in the "Catalogue for the Guidance of Foreign Investment Industries" or the "Catalog of Priority Industries for Foreign Investment in the Central-Western Region".

Withholding Obligation and Follow-Up Administration

Taxpayers are the overseas investors. The withholding agents are the subsidiaries that are deemed to distribute profits. Therefore, if the overseas investors want to apply for the preferential tax deferral treatment, they need to rely on the withholding agents to make the relevant process as follows:

- Foreign investors are responsible for providing the relevant supporting documents regarding its qualification for enjoying the preferential policy for the domestic enterprises;
- If the preconditions are assessed as being met to entitle the foreign investors for the benefits, the domestic enterprises shall perform the filing procedures at their competent tax authorities;
- If the tax authority verifies that the overseas investors do not meet the preconditions during the follow-up administration, it shall be subject to late payment fees for the overdue tax payment.

In addition, since the tax benefit is only tax deferral instead of exemption, the timing of tax liability is deferred to the time when the overseas investors actually recover the above reinvestment. This means that the deferred tax should be declared and settled within 7 days after actual receipt of payment, when the overseas investors recover the direct reinvestment through share transfer, stock repurchase, liquidation or other ways. If the relevant transaction meets the conditions of special tax treatment for re-organization, the tax deferral policy can still be enjoyed.

Retroactive Implementation

The tax deferral policy shall be implemented retroactively from January 1, 2017, i.e. it is applicable to the direct reinvestment contributed by profits after January 1, 2017. If an overseas investor is eligible for but does not enjoy such preferential policy in fact, it could file an application for re-enjoying the policy within three years from the date the relevant tax pay-

税政策，退还已缴纳的税款。

我们的观察

根据通知的前提条件，可以发现，通知发布前留存的未分配利润同样可以适用于递延纳税政策，同时递延缴纳的具体时点也得到了明确。

值得关注的是，外国投资者在 2017 年已经用收到的境内企业分配的利润进行的再投资不一定都可申请退税。目前依照政策，该利润如果直接分配到外国投资者境外账户后再用于境内再投资不符合享受纳税递延条件。外国投资者如果希望能享受该项递延纳税的待遇，则分配的利润不可以离开中国而需直接用于在华的再投资。

88 号文尚未明确投资者为享受政策所需准备的资料以及利润分配时所需进行的备案流程，我们预计国税总局未来会进一步颁布具体的管理文件以明确这些实际操作问题。

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ment is made in practice to get tax being refunded.

Our Observation

Referring to the preconditions stipulated in the Circular 88, it can be noted that undistributed profits retained before the issuance of the Circular 88 can also be applied to the tax deferral treatment.

It is worth to note that foreign investors who have received dividends from a subsidiary in China to reinvest in 2017 may not apply for the tax refund. According to the Circular, if profit has been paid to the offshore bank accounts of the investor, it does not qualify to enjoy the tax deferral policy. The Circular clarified that the profit shall not leave China and shall directly be used for the reinvestment.

Circular 88 has not yet specified the documents to be prepared for enjoying the benefits and record filing procedures should be undertaken during the transaction process. It is expected that the SAT will promulgate more detailed administration rules in the future to clarify these practical problems.

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Broadening horizons

„We must be continuously on alert for new developments to be able to master challenges in the best possible way. With curiosity and an innovative approach, we are creating forward-looking solutions.“

Rödl & Partner

„The building of human towers requires each team member to again and again attempt something new. In this way, we are able to rise above the challenge together.“

Castellers de Barcelona



„Each and every person counts“ – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. „Força, Equilibri, Valor i Seny“ (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.

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